

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARYELLE LAWANNA PRESTON,
Plaintiff,
v.
CITY OF OAKLAND, et al.,
Defendants.

Case No. 14-cv-02022 NC

**ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 74

This case is about the October 2013 termination of Daryelle Lawanna Preston from her position as Oakland City Employee Relations Director. Preston alleges that her termination was unlawful because it violated the First Amendment's protection of private speech and the California protection for whistleblowers. Preston believes she was fired because she spoke out publicly against her supervisor, City Administrator Deanna Santana, about issues of systemic abuse. Specifically, Preston points to four incidents which give rise to speech that she alleges are protected by the Constitution and state law. Defendants City of Oakland and Santana move for summary judgment on all issues presented in the complaint, arguing that all of the speech was made pursuant to Preston's job duties, so it is not protected. In addition, defendants argue that Preston cannot prove that she was fired because of the speech, claiming instead that she was fired for poor job performance.

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The Court has considered the evidence presented and concludes that there are genuine disputes of material facts as to nearly all instances of alleged protected speech. However, the Court finds that Preston's speech in the March 6, 2012, City Council meeting owed its existence to her role as Employee Relations Director. Because she was speaking in an official capacity about events that occurred in the course of her job, the Court finds that this speech cannot be considered private speech, and thus is not protected by the First Amendment. Therefore, the Court GRANTS summary judgment on the First Amendment claim regarding the March 6, 2012, City Council meeting. The Court DENIES summary judgment as to all other issues.

I. BACKGROUND

A. Facts Presented

In July 2007, Preston was hired by the City of Oakland as a Human Resources Manager. Preston Dep. 22, 27.¹ In August 2011, defendant Deanna Santana was hired as the Oakland City Administrator. Santana Dep. 4-5.² In January 2012, Santana promoted Preston to Employee Relations Director. Preston Dep. 39. Preston served as Employee Relations Director until her employment was terminated by Santana on October 3, 2013. Santana Dep. 40.

1. East Oakland Rainbow Teen Center Report

The Rainbow Teen Center Digital Arts & Culinary Academy (RTC) is a youth center in East Oakland. Blackwell Dep. 19. Fred Blackwell was an Assistant City Administrator under Santana. Santana Dep. 102. Santana assigned Preston and Blackwell to write a report concerning various issues regarding the RTC. Blackwell Dep. 24³; Preston Dep. 53. The report was "focused on management review," and Preston was

¹ Excerpts from Preston's deposition have been submitted to the Court as part of defendants' motion, Dkt. No. 80, Declaration of Otis McGee, Jr., Exhibits A and B. Additionally, plaintiff separately submitted an expanded excerpt as part of plaintiff's opposition, Dkt. No. 86, Declaration of Sonya Mehta, Exhibits A. The Court refers to these documents together as "Preston Dep."

² Dkt. No. 80, Declaration of Otis McGee, Jr, Exhibit C; Dkt. No. 86, Declaration of Sonya Mehta, Exhibit D ("Santana Dep.").

³ Dkt. No. 86, Declaration of Sonya Mehta, Exhibit B ("Blackwell Dep.").

1 responsible for investigating the RTC's staff hiring issues. Santana Dep. 131; Preston
2 Dep. 53-54.

3 The report went through many drafts, and Preston attended meetings on the report
4 with Santana and Oakland City Attorney Barbara Parker. Preston Dep. 151-52, 177.
5 Preston testified that during these meetings, Santana and Parker discussed including
6 language in the report that Councilmember Brooks violated City Charter § 218. Preston
7 Dep. 151-52. Preston testified that Santana and Parker disliked Brooks and wanted to
8 include the language in the report "because they believed this was their opportunity to get
9 rid of Desley Brooks." Preston Dep. 152.

10 At some point, Parker included language in the report stating, "we would
11 recommend [referring Brooks] to the Oakland DA for violating Charter section 218."
12 Santana Dep. 137-138; Preston Dep. 177. Preston testified that Santana ordered her to
13 include this language in the public RTC report. Preston Dep. 52, 70, 74. In February
14 2012, Preston refused to sign the report and informed Santana that she would not sign a
15 report that included any language about Brooks violating Charter § 218 or being referred to
16 the Oakland District Attorney. Preston Dep. 177. Preston told Santana that she thought
17 Santana was treating Brooks differently because Brooks is African American. Preston
18 Dep. 50-52. Santana testified that she also had concerns about including the language.
19 Santana Dep. 133-134. Santana decided that it was not her job nor did she have the
20 authority to declare whether a violation of the City Charter occurred, and the final report
21 did not include such language. Santana Dep. 133-134; Preston Dep. 74.

22 **2. March 6, 2012, City Council Meeting**

23 Preston and Santana attended a March 6, 2012, Oakland City Council meeting.
24 About four hours into the meeting, Councilmember Brooks disagreed with Santana
25 whether Brooks had been present at a meeting to discuss assigning the Rainbow
26 Community Center Director to oversee both the Rainbow Community Center and the RTC.
27 Preston Dep. 118. Santana asked Blackwell and Preston to come to the microphone to
28 "confirm" that Councilmember Brooks had been provided the information. Preston Dep.

1 118; Dkt. No. 87 (video recording of Council meeting). Preston testified that she stated at
 2 the City Council meeting that Brooks had not been informed. Preston Dep. 118-19. That
 3 night, Preston emailed Santana apologizing for contradicting Santana at the meeting.
 4 Preston Dep. 119, 122, 124. Santana replied that they had in fact agreed. Preston Dep.
 5 124. After Preston clarified her initial email, Santana replied that she had agreed all along.
 6 Preston Dep. 123-24. Santana testified that she still does not believe that Preston
 7 contradicted her. Santana Dep. 142.

8 Preston testified that after the March 6, 2012, meeting, Santana became hostile and
 9 confrontational with her. Preston Dep. 115. According to Preston, Santana seemed angry
 10 and short with Preston, and there was a chill to their relationship. Preston Dep. 115;
 11 Preston Decl. ¶ 6. Preston testified that Santana disinvited Preston to core team meetings
 12 and canceled one-on-one meetings. Preston Dep. 214.

13 **3. Tentative Agreement with International Association of Firefighters** 14 **Union, Local 55**

15 A “meet-and-confer” is a process an employer engages in with organized labor
 16 over a mandatory subject of bargaining in order to reach an agreement on terms and
 17 conditions. Preston Dep. 80-81. Preston testified that City of Oakland policy and
 18 procedure requires any city representative who intends to engage in a meet-and-confer
 19 with organized labor to obtain City Council authorization. Preston Dep. 83-85.

20 In February 2012, Preston sent out a memo noting that department managers had
 21 been negotiating a number of side letters with organized labor without authority, and
 22 reminded managers not to mislead labor groups on their authority to negotiate contracts.
 23 Preston Decl. ¶ 7. In March 2012, Oakland Fire Chief Teresa Reed emailed Preston
 24 stating she needed to reopen and renegotiate a contract because she had bargained without
 25 Council authority. Reed Dep. 12-14.⁴

26 In June 2013, the Oakland Fire Department engaged in a meet-and-confer with the
 27 International Association of Firefighters Union, Local 55 (“Local 55”) about extending a

28 ⁴ Dkt. No. 86, Declaration of Sonya Mehta, Exhibit I (“Reed Dep.”).
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Paramedic Support Program. Reed Dep. 18-20. As a result, the Fire Department and Local 55 agreed to extend the Paramedic Support Program for an additional 30 days. Reed Dep. 18-19. Council authorization and approval had not been obtained before the tentative agreement was negotiated and signed. Reed Dep. 22-25.

Reed testified that she thought Santana had given her approval to negotiate and sign the agreement. Reed Dep. 26. Santana states that she did not give Reed permission to negotiate the agreement without Council approval. Santana Dep. 85. Preston learned of the agreement and directed an employee relations staff to tell Reed not to negotiate the agreement without authorization. Preston Dep. 86, 88. Preston reported Reed's acts to Santana. Preston Dep. 88. Preston testified that Santana told her that City Council approval was a "waste of time." Preston Dep. 126. Preston believes that Reed and Santana had prior discussions to enter into the agreement without City Council approval. Preston Dep. 78-79. Preston declares that she reported the unlawful agreement to Santana, Parker, and Councilmember Brooks. Preston Decl. ¶¶ 9, 10.

Preston states that after many "unpleasant conversations" with Santana on the matter, the Tentative Agreement was presented to City Council in a special closed session meeting on July 10, 2013. Preston Dep. 126; Santana Decl. ¶ 7. Preston testified that Santana disinvited her from the closed City Council session where the agreement was ratified. Preston Dep. 127.

4. The Non-Collection of Union Dues

On August 6, 2013, Oakland Treasurer Katano Kasaine, Employee Relations staff Sonia Lara and Anderson, and members of the SEIU Local 1021 bargaining team had a meeting. Preston Dep. 93; Kasaine Dep. 10, 18, 22.⁵ Kasaine was responsible for collecting union dues from SEIU City employees. Kasaine Dep. 17. According to Lara and Anderson, Kasaine stated at the meeting that she had not been deducting union dues from part-time employees for years. Preston Dep. 94; Keffer Dep. 27-28; Lara Dep. 51-

⁵ Dkt. No. 86, Declaration of Sonya Mehta, Exhibit K ("Kasaine Dep.").
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52.⁶ Kasaine denied ever making this statement. Kasaine Dep. 21, 24, 30. Preston did not attend the meeting, but learned about the statements from Lara and Anderson. Preston Dep. 93.

On September 5, 2013, SEIU filed a grievance about the City's failure to collect union dues. Santana Decl. ¶ 9; Preston Dep. 99-100. Preston reported the grievance to Santana and Kasaine and started an investigation of the grievance. Preston Decl. ¶ 11. Kasaine responded that she did not need to be interviewed regarding the grievance. Kasaine Dep. 33-34. Preston made efforts to contact Kasaine, but never interviewed her. Kasaine Dep. 37.

Sometime later, Dwight McElroy, former SEIU president, informed Preston that Kasaine contacted him to request that the union drop the grievance and promised that if he did, she would make sure the union received all the money it was owed. Preston Dep. 101, 102, 146; McElroy Dep. 87-88.⁷ On September 12, 2013, Santana called Preston and removed her from the investigation. Preston Decl. ¶ 13. The Chief Assistant City Attorney denied that it was Preston's job duty to investigate. McGee Dep. 4, 25. Preston disclosed Santana's removal of her from the investigation, and the grievance itself, to Deputy Mayor Sandre Swanson. Preston Decl. ¶ 13.

On September 29, 2013, Preston reported Kasaine's interference with the investigation to Santana and Parker. Preston Decl. ¶ 17. Preston raised concerns that Kasaine was conducting analysis of the data regarding the grievance against her. Preston Decl. ¶ 17.

On October 1, 2013, Preston attended a closed-session meeting of the Oakland City Council. Preston Dep. 208-09. Preston testified that Santana ordered her not to disclose the SEIU grievance at the closed session. Preston Dep. 207-08. At the meeting, the City Council was reviewing a proposal submitted by SEIU. Preston Dep. 207-08. At the bottom of the proposal, there was some language about not withdrawing the grievance

⁶ Dkt. No. 86, Declaration of Sonya Mehta, Exhibits L, M.

⁷ Dkt. No. 86, Declaration of Sonya Mehta, Exhibit N.

concerning the City's failure to collect union dues. Preston Dep. 207-08. Councilmember Brooks asked Preston what the Union meant that it would not withdraw the grievance. Preston Dep. 208-09. Preston replied truthfully that SEIU had a grievance alleging the City had not been collecting dues from part-time employees for years. Preston Dep. 209.

Santana terminated Preston on October 3, 2013 at 8:45 a.m. Preston was denied the post-termination practice of "checking out" that all departing employees go through.

Santana Dep. 165-167.

B. Procedural History

Preston filed this lawsuit on March 17, 2014, in Alameda County Superior Court. Dkt. No. 2-1. After removing the action to federal court, the City of Oakland and Santana filed a motion to dismiss on May 9, 2014, which the Court denied. Dkt. Nos. 6, 16. On May 27, 2015, defendants moved for summary judgment on all claims. Dkt. No. 74. After plaintiff filed an opposition, defendants made twelve evidentiary objections in their reply. Dkt. Nos. 89, 90. The Court permitted plaintiff to file a response to the evidentiary objections after the briefing was complete. Dkt. Nos. 90, 92. The Court held a hearing on the motion on July 1, 2015. Dkt. No. 93. The Court has jurisdiction over Preston's First Amendment claim under 28 U.S.C. § 1331, and her state law claim under 28 U.S.C. § 1367. All parties have consented to the jurisdiction of a magistrate judge. Dkt. Nos. 8, 9.

II. LEGAL STANDARD

Summary judgment may be granted only when, drawing all inferences and resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Bald assertions that genuine issues of material fact exist are insufficient. *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

The moving party bears the burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings, and, by its own affidavits or discovery, set forth specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however, must be drawn in the light most favorable to the nonmoving party. *Tolan*, 134 S. Ct. at 1863 (citing *Liberty Lobby*, 477 U.S. at 255).

III. DISCUSSION

Defendants move for summary judgment on all claims. Dkt. No. 74. Preston has alleged (A) a violation of the First Amendment because she alleges the City fired her for her protected speech; and (B) a claim for unlawful retaliation under California Labor Code § 1102.5(b),(c). For both causes of action, Preston alleges that each of the four incidents recited above resulted in protected speech, and that there was a causal link between her speech and her termination. The four incidents are: the Rainbow Teen Center Report, the March 6, 2012, City Council meeting, the tentative agreement with Local 55, and the non-collection of union dues. The Court considers (A) the First Amendment claim; (B) the California Labor Code claims; and (C) the issue of causation. Within each claim, the Court analyzes all four incidents giving rise to alleged protected speech.

A. First Amendment Retaliation Claim

A claim for first amendment retaliation requires consideration of a five-factor test outlined in *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013). Those factors are:

- (1) whether plaintiff spoke on a matter of public concern;
- (2) whether the plaintiff spoke as a private citizen or public employee;
- (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) whether the state had adequate justification for treating the employee differently

1 from other members of the general public; and
 2 (5) whether the state would have taken the adverse employment action even absent the
 3 protected speech.

4 *Id.* The test under *Dahlia* is cumulative, meaning that all factors are necessary, and failure
 5 to meet any one of them is fatal to the plaintiff's case. *Id.* at 1067 n.4. The plaintiff has
 6 the burden of proof as to the first three factors, while the burden shifts to the government
 7 to prove the last two. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir.
 8 2011). The first two factors require the Court to analyze the content and the context of the
 9 speech to determine whether it constitutes protected speech, while the next three factors
 10 look at the causal relationship between an employee's protected speech and her
 11 termination. The Court first considers whether Preston's speech constitutes protected
 12 speech. The remaining factors will be analyzed in Section III.C. below.

13 Generally, a public employee's speech is not protected by the First Amendment
 14 when it is made pursuant to the employee's official duties. *Garcetti v. Ceballos*, 547 U.S.
 15 410, 421 (2006); *Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013). To determine
 16 whether speech is made pursuant to the employee's official duties, the Court in *Dahlia* set
 17 forth three guidelines but no bright line rule. First, the Court can consider whether the
 18 speech is made within the plaintiff's chain of command. *Dahlia* at 1074. Second, if the
 19 speech reflects broad concerns about corruption or systemic abuse outside professional
 20 duties, then it is more likely private speech. *Id.* at 1075. Third, if the speech was made in
 21 direct contravention to a supervisor's orders, then it is more likely private speech. *Id.*

22 Because there is no bright line rule and questions of protected speech require
 23 examining both the content of the speech and context in which it was spoken, the Ninth
 24 Circuit has cautioned that such determinations are best left for a jury. For example, the
 25 scope and content of plaintiff's job responsibilities is a question of fact. *Posey v. Lake*
 26 *Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130-31 (9th Cir. 2008). Additionally,
 27 *Dahlia* notes, "the inquiry into the protected status of speech presents a mixed question of
 28 fact and law, and specifically that question of the scope and content of a plaintiff's job

responsibilities is a question of fact. Therefore we held that, ‘when there are genuine and material disputes as to the scope and content of the plaintiff’s job responsibilities, the court must reserve judgment on [whether the plaintiff’s speech was pursuant to his official duties] . . . until after the fact-finding process.’” *Dahlia*, 735 F.3d at 1072 (quoting *Posey*, 546 F.3d at 1123). Additionally, the Ninth Circuit said that even though other circuits disagree, “We continue to adhere to our view and note that when an inquiry ‘is a mixed question of law and fact, . . . it will often be inappropriate to take the question from the jury.’” *Id.* at n.12 (quoting *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997)).

Therefore, the Court considers each incident of speech that Preston claims is protected in turn, examining whether there is a material dispute as to the scope of plaintiff’s job responsibilities.

1. Rainbow Teen Center Report

Defendants argue that preparing a report was part of Preston’s job duties and is not protected. Dkt. No. 74 at 10-11. Preston contends that her refusal to include language about a violation of the city charter was protected speech. Dkt. No. 83 at 16-17.

When an “employee prepares a routine report, pursuant to normal departmental procedure about a particular incident or occurrence, the employee’s preparation of that report is typically within his job duties.” *Dahlia*, 735 F.3d at 1075. However, complaints regarding “broad concerns about corruption or systemic abuse” are unlikely to “be classified as being within the job duties of an average public employee.” *Id.*

The City argues that Preston admits her duties included drafting and revising agenda reports. Preston Dep. 191-193. Preston only communicated her refusal to sign the report to her immediate supervisor, Santana. Preston Dep. 177. Additionally, the City argues, City Attorney Barbara Parker added the language to the report that Preston objected to, not Santana. Preston Dep. 177. Preston responds that the report was not “routine” because it was an issue of intense public debate. Dkt. No. 83 at 17. Preston contends that she believed the accusations against Councilmember Brooks were racially motivated. Preston Dep. 50, 52, 60. According to Preston, Santana and Parker discussed

1 including the language that Brooks violated the City Charter in order to get rid of Brooks.
2 Preston Dep. 151-152. Preston believes she was ordered by Santana to include the
3 language and to sign the report. Preston Dep. 52, 70, 74. However, Santana concluded
4 that it was not her job, nor did she have the authority, to declare whether a violation of the
5 City Charter occurred. Santana Dep. 133-134.

6 The Court finds that there is a genuine dispute of material fact as to whether this
7 report was a “routine report, pursuant to normal departmental procedure” and whether
8 Preston’s concerns were related to corruption or systemic abuse. Drawing all inferences in
9 favor of the nonmoving party, the Court concludes that a reasonable jury could find that
10 the Rainbow Teen Center report was not routine, and that making assessments of a
11 councilmember’s compliance with local law was not within the scope of Preston’s duties.
12 Therefore, the Court denies summary judgment as to this issue.

13 **2. March 6, 2012, City Council Meeting**

14 Defendants argue that Preston was acting within the scope of her duty as Employee
15 Relations Director when she testified about the RTC on March 6, 2012. Dkt. No. 74 at 12.
16 Defendants note that Preston’s statements were related to her job duties, preparing a report
17 about the RTC. *Id.* Preston argues that Santana asked her to “confirm” Santana’s false
18 statement that Brooks was informed about RTC staffing choices. Dkt. No. 83 at 18.
19 Preston argues that the City Council is outside her chain of command, so her disclosure to
20 it that Santana’s statement was false is protected speech. *Id.*

21 “When a public employee raises complaints or concerns up the chain of command
22 at his workplace about his job duties, that speech is undertaken in the course of performing
23 his job.” *Dahlia*, 735 F.3d at 1074. Whether an employee expresses her views inside the
24 office rather than publicly is not dispositive. *Garcetti*, 547 U.S. at 421. However,
25 “[s]peech which owes its existence to an employee’s professional responsibilities is not
26 protected by the First Amendment.” *Hagen*, 736 F.3d at 1258. In *Freitag v. Ayers*, 468
27 F.3d 528, 544 (9th Cir. 2006), the Ninth Circuit held that where a prison official made
28 internal reports of inmate sexual misconduct, she spoke as a public employee and the

1 speech was unprotected. However, when she made external reports about the same
2 circumstances to a state senator and the state inspector general, she acted as a citizen and
3 the speech was protected. *Id.*

4 Preston acknowledges that overseeing the staffing of the Rainbow Teen Center is
5 part of her professional duties. Preston Dep. 191. During the City Council meeting,
6 Santana called Preston to the microphone to “confirm” the contents of a meeting between
7 city officials and Brooks about staffing of the RTC. Preston Dep. 118. Preston went to the
8 microphone, and discussed the contents of what occurred at the meeting. Preston Dep.
9 118.

10 The Court finds that Preston was speaking as a public official, on official business.
11 She attended the City Council meeting as part of her job duties. Preston was called to the
12 microphone as a public official to discuss the contents of a meeting that she attended in her
13 professional capacity. Although a reasonable juror could infer that Preston did contradict
14 Santana, her speech at the City Council meeting owes its existence to her position with the
15 city. Therefore, the Court concludes that Preston’s First Amendment claim is precluded as
16 a matter of law and grants summary judgment as to this issue.

17 **3. Tentative Collective Bargaining Agreement**

18 Defendants argue that Preston’s reporting of Reed’s actions was within her job
19 duties, and thus not protected speech. Dkt. No. 74 at 13. Additionally, defendants argue
20 that Preston did not report Reed’s acts to anyone outside her chain of command. *Id.* at 14.
21 Preston argues that Santana ordered her to ignore the lack of City Council authorization.
22 Dkt. No. 83 at 19. Preston also argues that she was reporting about a systemic problem,
23 that Reed was entering into agreements without authorization. *Id.* Finally, Preston argues
24 that she reported her concerns to the City Attorney and Councilmember Brooks, both of
25 whom were not in her chain of command. *Id.*

26 In *Marable v. Nitchman*, 511 F.3d 924, 927 (9th Cir. 2007), the Court clarified
27 when reporting corruption or systemic abuse falls within an employee’s job description.
28 There, “a ship engineer complained of corruption by the manager of the Washington State

1 Ferries.” *Id.* (summarized by *Hagen v. City of Eugene*, 736 F.3d 1251, 1259 (9th Cir.
2 2013)). The Ninth Circuit found “that *Garcetti* was inapplicable because it was not part of
3 a ship engineer’s assigned duties to complain about corrupt conduct of his supervisors.”
4 *Id.* at 1259.

5 Preston acknowledges that her job of supervising employee relations unit included
6 collective bargaining and meet-and-confer sessions. Preston Dep. 185. In addition,
7 negotiating with unions was part of her job duties. Preston Dep. 80. Preston reported the
8 unauthorized tentative agreement to Santana, City Attorney Parker, and Councilmember
9 Brooks. Preston Dep. 126-27. The City Administrator and City Attorney are responsible
10 for setting the closed session agenda. Preston Dep. 126-27. The parties dispute what
11 Santana’s reaction was to Preston’s disclosure of the unauthorized agreement. The Court
12 finds that drawing all inferences in favor of Preston, a reasonable jury could find that
13 Santana failed to respond appropriately to Preston’s complaints. Therefore, Preston’s
14 report to Parker and Brooks could have been beyond her assigned duties. Thus, the Court
15 denies summary judgment as to this issue.

16 **4. Non-collection of Union Dues**

17 Defendants argue that Preston’s report of the non-collection of union dues was
18 made as part of her official duties. Dkt. No. 74 at 15. Preston argues that she reported the
19 grievance to Deputy Mayor Sandre Swanson who was not in her chain of command, and
20 that she was ordered not to tell the City Council about the grievance. Dkt. No. 83 at 20.

21 In *Dahlia*, the Ninth Circuit concluded that “when a public employee speaks in
22 direct contravention to his supervisor’s orders, that speech may often fall outside of the
23 speaker’s professional duties.” 735 F.3d at 1075. The Court continued, “Even assuming
24 *arguendo* that Dahlia might normally be required to disclose misconduct pursuant to his
25 job duties, here he defied, rather than followed, his supervisors’ orders.” *Id.* Therefore,
26 even if one of Preston’s job duties was to report grievances, if Preston defied Santana’s
27 order not to report this grievance, Preston’s speech may be protected.

28 Preston testified that her unit, the Employee Relations Unit, is the only one

1 authorized to engage in collective bargaining. Preston Dep. 187. Preston reported the
 2 grievance to both Santana and Deputy Mayor Sandre Swanson. Preston Decl. ¶ 13.
 3 Additionally, she was taken off the investigation, but she continued to follow up. Preston
 4 Decl. ¶¶ 13, 17. Preston testified that Santana ordered her not to tell the City Council
 5 about the grievance, but that she believed lying to the City Council would be a violation of
 6 law. Preston Dep. 209. Drawing all inferences in favor of the nonmoving party, the Court
 7 finds there is a genuine dispute of material fact whether Preston was acting within the
 8 scope of her job and whether she was reporting issues of broad systemic corruption.
 9 Additionally, there is a genuine dispute of material fact whether Preston was defying a
 10 direct order from Santana not to disclose the grievance to the City Council. Thus, the
 11 Court denies the motion for summary judgment as to this issue.

12 **B. California Labor Code Claim**

13 Preston's second claim is brought under California Labor Code §§ 1102.5(b),(c),
 14 which provides in relevant part:

15 (b) An employer, or any person acting on behalf of the employer, shall not retaliate
 16 against an employee for disclosing information . . . if the employee has
 17 reasonable cause to believe that the information discloses a violation of state or
 18 federal statute, or a violation of or noncompliance with a *local*, state, or federal
 19 rule or regulation, regardless of whether disclosing the information is part of the
 20 employee's job duties.

21 (c) An employer, or any person acting on behalf of the employer, shall not retaliate
 22 against an employee for refusing to participate in an activity that would result in
 23 a violation of state or federal statute, or a violation of or noncompliance with a
 24 *local*, state, or federal rule or regulation.

25 The law stated above is the version of the Labor Code which was revised on
 26 January 1, 2014, to include protection for speech about violations of "local law" (revision
 27 in italics). The previous version, which was in effect from January 1, 2004, through
 28 December 31, 2014, prohibits retaliation against an employee who disclosed information

1 about, or refused to participate in, violations of only state and federal law. The events
2 alleged in the complaint predate the 2014 version of the law; therefore, the Court must
3 decide which version of the law is applicable to Preston's claims.

4 Defendants argue that the law should not apply retroactively because there is no
5 legislative intent to do so. Dkt. No. 74 at 17. Citing to *McClung v. Employment Dev.*
6 *Dep't*, 34 Cal. 4th 467, 471-75 (2004), defendants argue that the Court can only apply a
7 law retroactively if there is clear and unavoidable implication of legislative intent, which
8 here there is not. Plaintiff does not address this argument in her opposition papers, but in
9 application, only relies on violations of "state and federal law" without mentioning local
10 law. The Court agrees with defendants that the 2014 statute does not demonstrate
11 legislative intent to apply the law retroactively. Therefore, the Court considers the pre-
12 2014 version of California Labor Code §§ 1102.5(b),(c).

13 A prima facie case of employment retaliation under California Labor Code § 1102.5
14 requires plaintiff to demonstrate that she was subjected to adverse employment action after
15 engaging in protected activity, and that there was a causal connection between the two.
16 *Edgerly v. City of Oakland*, 211 Cal. App. 4th 1191, 1199 (2012). An employee engages
17 in protected activity when she "discloses to a governmental agency reasonably based
18 suspicions of *illegal activity*." *Mokler v. County of Orange*, 157 Cal. App. 4th 121, 138
19 (2007) (italics in original). The employee must "reasonably believe . . . he was disclosing
20 a violation of state or federal law." *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal.
21 App. 4th 1378, 1384 (2005). "To have a reasonably based suspicion of illegal activity, the
22 employee must be able to point to some legal foundation for his suspicion—some statute,
23 rule or regulation which may have been violated by the conduct he disclosed." *Fitzgerald*
24 *v. El Dorado Cnty.*, 12-cv-02932 KJN, 2015 WL 966133, at *13 (E.D. Cal. Mar. 3, 2015)
25 (citing *Love v. Motion Indus., Inc.*, 209 F. Supp. 2d 1128, 1135 (N.D. Cal. 2004)). As with
26 the First Amendment issue, the Court will first consider whether Preston engaged in
27 protected activity, and then address the causal connection in Section III.C.

28 /

1. Rainbow Teen Center Report

Defendants argue that Preston's labor code claim fails because (1) there is no evidence that the edits made to the RTC report violated a law; and (2) Preston is not an attorney and does not know whether a violation of § 218 had occurred. Dkt. No. 74 at 18. Preston contends that she had a reasonable belief that Santana was breaking federal and state laws against racial discrimination by targeting Brooks in the RTC report. Dkt. No. 83 at 21. Preston points to a later City Council meeting where several Council members stated that they had all violated § 218, and it was inappropriate to attack only Brooks. Preston Dep. 153. Preston need only have a reasonable belief that if she participated in the activity, it would constitute a violation of law. Drawing all inferences in favor of the nonmoving party, Preston's testimony demonstrates that a reasonable jury could find that she reasonably believed that the language about a violation of § 218 was included for improper purposes. Preston believed that if she participated in including the language in the RTC report, without knowledge of whether Brooks in fact violated the charter, she would be committing a violation of law. Preston Decl. ¶ 4. Therefore, a genuine dispute of material fact remains and summary judgment is denied.

2. March 6, 2012, City Council Meeting

Defendants contend that Santana did not call on Preston specifically to lie or violate state or federal law by falsely testifying. Dkt. No. 74 at 18. In addition, Santana does not believe that Preston contradicted her. Santana Dep. 142-147. Preston argues that she had reasonable cause to believe that lying to the City Council would be a violation of state laws against fraud. Dkt. No. 83 at 21-22. Preston argues that by asking her to "confirm" the facts of the meeting between Brooks and Santana, Santana was asking Preston to lie. *Id.* Drawing all inferences in favor of the nonmoving party, the Court finds that a reasonable jury could conclude that Santana's request for Preston to "confirm" the details was an order to lie to the City Council. Preston's deposition demonstrates that she believed it would be a violation of state law to lie at a City Council meeting. Preston Dep. 118. Therefore, there is a genuine dispute of material fact. The Court denies summary

1 judgment as to this issue.

2 **3. Tentative Collective Bargaining Agreement**

3 The defendants argue that Preston admits the collective bargaining agreement was
4 entered into in violation of local law, not state or federal law. Dkt. No. 74 at 19.
5 Therefore, it is not a violation of the California Labor Code. *Id.* Preston argues that she
6 had reasonable cause to believe the unauthorized bargaining violated City Ordinance
7 12903 and Cal. Gov't Code § 3505 as an unfair labor practice. Dkt. No. 83 at 22. The
8 Court finds that there is a dispute of fact as to whether Preston reasonably believed the
9 collective bargaining agreement was a violation of state law. Therefore, the Court denies
10 summary judgment as to this issue.

11 **4. Non-collection of Union Dues**

12 Defendants argue that Kasaine did not violate a California law and Preston's
13 reporting of the grievance to the City Council was not a disclosure of unlawful activity.
14 Dkt. No. 74 at 19. Preston responds that she believed Kasaine was violating California
15 Government Code § 3506. Dkt. No. 83 at 22; Preston Decl. ¶ 12. Additionally, Preston
16 believed that it would be a violation of law to lie to the City Council. *Id.* Drawing all
17 inferences in favor of the nonmoving party, the Court finds that a reasonable jury could
18 conclude that Preston reasonably believed she was disclosing a violation of federal law. A
19 reasonable jury could also find that Preston believed she would be committing a violation
20 of law if she did not answer Brooks' question truthfully. Summary judgment is denied as
21 to this issue.

22 **C. Causal Relationship**

23 First Amendment and California Labor Code claims require a casual link between
24 alleged protected activity and the defendants' adverse employment action. *Eng v. Cooley*,
25 552 F.3d 1062, 1071 (9th Cir. 2009); *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th
26 52, 69 (2000). Generally, causation is a "question of fact that must be decided in light of
27 the timing and surrounding circumstances." *Eng*, 552 F.3d at 1071. A plaintiff can
28 demonstrate causation in three ways: (1) proximity in time between the protected speech

1 and the retaliatory employment decision; (2) evidence that the employer expressed
2 opposition to employee's speech, either to employee or others; or (3) evidence that
3 employer's proffered explanations for the adverse action were false and pre-textual.
4 *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003).

5 On the first factor, there is no bright line rule on when is too long to establish
6 proximity in time. *Id.* at 977-78. "Depending on the circumstances, three to eight months
7 is easily within a time range that can support an inference of retaliation." *Id.* at 977. "[A]n
8 eleven-month gap in time is within the range that has been found to support an inference
9 that an employment decision was retaliatory." *Allen v. Irano*, 283 F.3d 1070, 1078 (9th
10 Cir. 2002).

11 Here, Preston argues that Santana terminated her less than 40 hours after Preston
12 revealed the SEIU grievance to the City Council. Dkt. No. 83 at 24. The first instances of
13 protected speech that Preston alleges led to her termination was the Rainbow Teen Center
14 Report leading up to the March 6, 2012 City Council meeting. Although Preston was not
15 terminated until October 2013, drawing all inferences in favor of the nonmoving party,
16 Preston's testimony sets out that her relationship with Santana began to deteriorate as a
17 result of her alleged protected speech. Preston Dep. 115; Preston Decl. ¶ 6. Additionally,
18 the Court finds that Preston's termination was so close in time to her speech about the
19 SEIU grievance that a reasonable jury could infer causation. Therefore, the Court finds
20 that drawing all inferences in favor of Preston, she has sufficiently demonstrated causation.

21 A defendant may avoid liability for retaliation by showing that it would have
22 reached the same adverse employment decision even in the absence of the employee's
23 protected conduct. *Eng*, 552 F.3d at 1072; *Mokler v. Cnty. of Orange*, 157 Cal. App. 4th
24 121, 138 (2007). Defendants argue that (1) Santana decided to terminate Preston before
25 her alleged protected speech; and (2) Preston would have been terminated regardless for
26 failure to properly execute her job duties. Dkt. No. 74 at 21-23.

27 **1. Timing of Termination Decision**

28 Santana testified that she first contemplated terminating Preston in February or

March 2013 because Preston destroyed a written statement prepared by a City employee for an investigation being initiated by the Human Resources department. Santana Dep. 17-18. Santana spoke with former mayor Jean Quan about hiring a new Employee Relations Director. Quan Decl. ¶ 2. Santana made the decision to terminate Preston in June 2013 and informed Mayor Quan of this decision. Santana Dep. 27. Preston responds that she was not terminated until October 2013, and less than 40 hours after she defied Santana's order not to disclose the SIEU grievance to the City Council. Dkt. No. 83 at 23-24. Additionally, Preston states that Santana did not provide any reasons for terminating Preston. *Id.* Finally, Preston points to a series of acts that Santana took that demonstrate malicious intent. Starting in June or July 2013, Santana accessed Preston's computer to track Preston's emails. Santana Dep. 31-32. Preston argues that Santana did not obtain authorization to track her emails, and that Santana's intent was malicious. Dkt. No. 83 at 24. The Court finds that there is a question of fact as to Santana's intent in terminating Preston, which should be left for a jury to determine.

2. Reason for Termination

Defendants argue that Preston would have been terminated for failure to properly execute her job duties. Dkt. No. 74 at 22-23. The City sets forth a variety of reasons to demonstrate that Preston was not performing her job duties.⁸ Preston responds that she was not informed of these reasons before her termination. Dkt. No. 25. Preston presented the testimony of various colleagues and Deputy Mayor Sandre Swanson that attests to her good work performance. Ewell Dep. 66-67; Lara Dep. 73-75; Dkt. No. 85, Swanson Decl. ¶ 6. The Court concludes that both sides have presented evidence, which demonstrates that there is a genuine dispute of material fact as to why Preston was terminated.

IV. CONCLUSION

In conclusion, the Court GRANTS defendants' summary judgment as to Preston's First Amendment claim about the March 6, 2012, City Council meeting. On all other

⁸ Dkt. No. 80, Exhibit E: defendants' supplemental response to plaintiff's special interrogatories, set one, No. 2.

1 issues presented, the Court DENIES defendants' summary judgment motion. The Court
2 finds that drawing all inferences in favor of the plaintiff, there are genuine disputes of
3 material facts suitable for determination by a jury.

4 Additionally, defendants objected to several pieces of evidence presented with
5 plaintiff's opposition briefing. Dkt. No. 89. Because that evidence was not necessary for
6 the Court to reach its conclusion, the Court does not rule on the objections at this time.

7 The Court has already issued a pretrial order detailing what the parties must prepare
8 for trial. Dkt. No. 98. The parties are reminded that if they wish this case to be referred to
9 a magistrate judge for a settlement conference before trial, they must file a request for
10 referral by July 27, 2015.

11 **IT IS SO ORDERED.**

12 Dated: July 23, 2015



NATHANAEL M. COUSINS
United States Magistrate Judge

United States District Court
Northern District of California